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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES,

11 Plaintiff,

12 vs.

13 JOSE LUIS LOPEZ-LOPEZ,

14 Defendant.

CASE NO. 07 cr 3346-H

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO COMPEL
GOVERNMENT TO REOFFER 48
MONTHS**

**Time: 2:00 p.m.
Date: April 28, 2008**

15 **I.**

16 **FACTS**

17 The government has indicted Mr. Lopez-Lopez being a deported alien
18 found in the U.S. in violation of 8 USC § 1326.

19 Before he was indicted, the government offered Mr. Lopez-Lopez a 48
20 month deal, which he accepted. On November 20, 2007 Mr. Lopez-Lopez
21 waived indictment. (11/20/07 RT [Ex. A hereto], 5:1.) However, on December
22 11, 2007, the date set for the plea in the case, Mr. Lopez-Lopez's counsel stated
23 as follows:

24 I did want to let the Court know that originally we did
25 need some more time to resolve some issues in Mr.
26 Lopez's case and he's indicated to me this morning that
27 he was wanting to plead guilty and I keep wavering,
28 but we do need some additional time and I think that
the best thing is to do just - - I was told we just set some
dates in front of the assigned district court judge.
(12/11/07 RT [Ex. B hereto], 2: 2-8.)

1 Previous counsel for Mr. Lopez-Lopez then advised the U.S. Magistrate
2 Judge that "we may be able to resolve this case" but neither he, the Court, or the
3 Assistant U.S. Attorney ever noted that Mr. Lopez-Lopez would lose the 48
4 month offer if he did not plead that date. (12/11/07 RT, 3: 15-17.) On the next
5 day the government indicted Mr. Lopez-Lopez and revoked the 48 month offer.
6 On January 3, 2008 prior counsel conflicted off this case and present counsel was
7 appointed.

8 Upon receipt of prior counsel's file, present counsel discovered the 48
9 month plea agreement signed by Mr. Lopez-Lopez. (Ex. C hereto.) Also in that
10 file was a fax memo dated November 19, 2007 from prior counsel to the
11 government stating that Mr. Lopez-Lopez accepted the 48 month offer but that
12 prior counsel "will continue to try and convince you to a lesser term due to
13 possible equities in my client's behalf and I will endeavor to send you a letter
14 with as much information as possible on behalf of Mr. Lopez." (Ex. D hereto.)
15 Previous counsel's file does not contain the promised letter.

16 Mr. Lopez-Lopez now moves this Court for an order allowing Mr. Lopez-
17 Lopez to accept the previous offer.

18 II.

19 **THIS COURT SHOULD ORDER THAT MR. LOPEZ-LOPEZ "BE**
20 **PUT BACK IN THE POSITION HE WOULD HAVE BEEN IN IF**
21 **THE SIXTH AMENDMENT VIOLATION HAD NOT**
22 **OCCURRED"**

23 It is clear from the transcript of the hearings and previous counsel's file
24 that Mr. Lopez-Lopez accepted a 48 month offer but that prior counsel thought
25 that Mr. Lopez-Lopez should get a better deal. Instead, however, previous
26 counsel got Mr. Lopez-Lopez a worse deal. The net result is that Defendant was
27 denied his Sixth Amendment right to the effective assistance of counsel during
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1 the very critical stage of the proceedings were an informed decision regarding
2 the government's plea offer had to be made.

3 The Ninth Circuit, in United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994),
4 held that the failure by counsel to communicate a plea agreement offer to a
5 defendant constitutes ineffective assistance of counsel. One of the cases cited in
6 Blaylock, Turner v. Tennessee, took this theory one step further in it's
7 application. Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988), *vacated on other*
8 *grounds*, 492 U.S. 902 (1989), *reinstated*, 726 F.Supp. 1113 (M.D. Tenn. 1989), *aff'd*,
9 940 F.2d 1000 (6th Cir. 1991), *cert denied*, ---U.S. ---, 112 S.Ct. 915 (1992). The
10 Court in Turner found that even though the defendant **was informed** of the
11 government's offer, the way in which the defendant was informed was
12 ineffective. See also, United States v. Rivera-Sanchez, 222 F.3d 1057 (9th Cir.
13 2000) (where court found that the "way" in which the defendant was informed
14 by counsel of the government's offer was indeed proper); and, United States v.
15 Carter, 130 F.3d 1432, 1441-42 (10th Cir. 1997)(court noted "way" counsel
16 informed defendant did not reflect ineffective advise).

17 The Ninth Circuit in Blaylock analyzed Turner stating;

18 [the Court in Turner] Held that an attorney's incompetent advise resulting
19 in the defendant's rejection of a plea offer constituted ineffective
20 assistance of counsel. [citation omitted] If an attorney's incompetent
21 advise regarding a plea bargain falls below a reasonable standards of
22 professional conduct, a fortiori, failure even to inform defendant of the
plea offer does so as well.

23 Blaylock at 1465-66.

24 In United States v. Day, 285 F.3d 1167 (9th Cir. 2002) the 9th Circuit
25 considered the issue of whether – "defense counsel's erroneous advice deprived
26 defendant of an opportunity to intelligently consider his plea offer and to make
27 an informed decision about it, and thus, resulted in 'prejudice' to defendant, as
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1 required to establish an ineffective assistance of counsel claim.” Day, 1167.
2 Counsel in Day, unlike that in Blaylock, actually informed Day about the
3 government’s offer, but did so ineffectively. Day at 1169.

4 In Day the court also noted that:

5 An attorney's incompetent advice resulting in a
6 defendant's rejection of a plea offer can constitute
7 ineffective assistance of counsel. See United States v.
8 Blaylock, 20 F.3d 1458, 1465-66 (9th Cir.1994). In
9 Blaylock, the defendant's attorney failed to inform him
10 of a plea offer made by the prosecutor, and the
11 defendant went to trial. “[A]lthough **Blaylock** ...
12 received a fair trial, he is not precluded from showing
13 prejudice.” Id. at 1466. The court found that **Blaylock**
14 was prejudiced by his counsel's incompetence because
15 the trial court would have been willing to grant
Blaylock a reduction for acceptance of responsibility if
he had accepted a plea offer prior to trial, but that the
court refused to do so after trial. See id. at 1467.

16 Day at 1172. The court in Day felt it necessary to note –“Blaylock is controlling
17 on the prejudice question, because Day also contested factual guilt at trial.” Day
18 at 1172.

19 Indeed, the court in Day specifically noted:

20 Because Day contested this charge, there was similarly
21 [as in Blaylock] no basis for awarding acceptance of
22 responsibility after trial. Like **Blaylock**, who was never
23 informed of the plea offer and **therefore was deprived**
24 **of his right to take advantage of it, Day never had the**
25 **opportunity to consider intelligently his plea offer**
26 **and to make an informed decision about it.** Day's
27 higher sentence after trial similarly resulted from the
28 very fact of a trial itself, a fact that was brought about
by [counsel’s] erroneous advice. There is no guarantee
that Day would have received a reduction for
acceptance of responsibility after trial *even if* he had

1 testified truthfully.

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3 Day at 1172, (emphasis added).

4 The remedy for counsel's ineffective assistance is to "put the defendant
5 back in the position he would have been in if the Sixth Amendment violation
6 had not occurred." *Blaylock*, 20 F.3d at 1468. Thus, the appropriate remedy is to
7 direct the government to reinstate its original plea offer. See *Id.* at 1468-69.
8 Accord, *Turner v. Tennessee*, 858 F.2d 1201, 1208 (6th Cir.1988), *vacated on other*
9 *grounds*, 492 U.S. 902 (1989), *reinstated*, 726 F.Supp. 1113, *aff'd*, 940 F.2d 1000, *cert.*
10 *denied*, 502 U.S. 1050 (1992) ("the only way to neutralize the constitutional
11 deprivation suffered by Turner," was to allow defendant to consider the state's
12 prior plea offer with the effective assistance of counsel).

13 It is clear from the Exhibits proffered as well as the conduct of the
14 defendant that the defendant had accepted the 48 month plea offer or would
15 have accepted the offer with conflict free counsel. The conditions set forth in the
16 plea offer were substantially met before previous counsel unilaterally refused to
17 go forward with the plea as scheduled. The defendant signed the plea
18 agreement, waived indictment, and was arraigned on the information. In
19 addition, his attorney noted that he wanted to plead on the date set. All these
20 actions on his part indicate an acceptance of the plea offer.

21 This Court has the authority to put Mr. Lopez-Lopez back into the same
22 position he was before his attorney unilaterally decided not to plead Mr. Lopez-
23 Lopez. Thus, he asks this Court for that relief.

24 **III.**

25 **CONCLUSION**

26 For the foregoing reasons, this Court should grant the above motion.

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28 Dated: April 15, 2008

Respectfully submitted,

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/S/ Knut S. Johnson
Knut S. Johnson, Esq. for
Mr. Lopez-Lopez